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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ANTHANASIOS LIVADITIS, also known as TOM D'OR,

Petitioner,

v.

MARILUZ ROSARIO, TERESA SHAPIAMA, LIGNY CANET, DOLORES MALDONADO, CARMEN ORTIZ, SHEILA BENTON, CHARLIE LOWE, MILAGRO PEREZ, MYRNA GARCIA, DANIEL BARBA, ALTAGRACIA LOPEZ and JOYCE E. WALKER, individually and on behalf of all others similarly situated,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether a defendant in an action in the district court was unconstitutionally denied his right to a jury trial where the appellate court may have abused its discretion in allowing the plaintiffs to conform the pleadings to the proof and add the defendant to a count in which he was not named and on which no evidence from the record was either produced or referred to.

II.

Whether the appellate court erred in allowing the plaintiffs to alter and amend a judgment through either Fed. R. Civ. P. 59(e) or 60(a) or (b) long after the time for such action had expired.

III.

Whether the plaintiffs had the proper standing to invoke court authority and assistance to enforce a judgment against a defendant who was not named in the count of the complaint upon which plaintiffs sought enforcement.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner Anthanasios Livaditis respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled proceeding on May 13, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 963 F.2d 1013 (7th Cir. 1992) and is printed in Appendix A. The judgment of the United States District Court, Northern District of Illinois, is printed in Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit (Appendix A) was entered on May 13, 1992. A timely petition for rehearing was denied on July 7, 1992 (Appendix B). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

United States Constitution, Amendment VII:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Statutes

Federal Rule of Civil Procedure Rule 6(b):

> Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (1) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them.

Federal Rule of Civil Procedure 15(b):

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise the issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not effect the result of the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defer upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Federal Rule of Civil Procedure 59(e):

> A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Federal Rule of Civil Procedure 60(a):

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Federal Rule of Civil Procedure 60(b):

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF CASE

Anthanasios Livaditis (a/k/a Tom D'Or) ("Livaditis") owned and operated two beauty schools, known as the D'Or Beauty College and the D'Or School of Cosmetology.[1] In 1987, fourteen hundred and four students brought a class action against the two schools and against Livaditis ("Defendants"). The Class Plaintiffs ("Plaintiffs") alleged that the Defendants violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(a), (c); the Illinois Consumer Fraud Act ("CFA"), Ill. Rev. Stat. Ch. 121½, ¶ 262; and committed common law breach of contract. The jury trial began on August 7, 1989, and concluded when the jury rendered its verdict on August 25, 1989.

On the Class Plaintiffs' Fourth Amended Complaint, the jury found against the two defendant schools on two Federal RICO counts (Counts I and II; against the Class Plaintiffs on one RICO count (Count IV) and on the breach of contract claim (Counts IV, V); and for the Class Plaintiffs on the pending Illinois Consumer Fraud Count (Count VI). Damages in excess of $600,000 were awarded only against the two corporate Defendants only on the consumer fraud count, a count in which Livaditis was not named defendant. The district court awarded attorney's fees later. After the trial, the Class Plaintiffs sought to execute the judgment against both the corporate Defendants, who had been identified in Count VI of the Complaint and also against Livaditis who had not been named in either the count or in the verdict.

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[1] D'Or Beauty College and D'Or School of Cosmetology were co-defendants with Anthanasios Livaditis in the District Court case. They have not petitioned to this Court.

On May 10, 1990, as a result of the Class Plaintiffs' judgment and their attempts to execute on him individually, Livaditis was forced to file a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code.

In February, 1992, Livaditis' bankruptcy attorneys discovered that Livaditis was not named in Count VI of the Fourth Amended Complaint, which was the only count on which the jury awarded damages. Prior counsel to Livaditis, including his trial, appellate and former bankruptcy attorneys, had not raised this point. On March 11, 1992, his present bankruptcy attorneys filed a "Motion for Leave to File Additional Appearance" and a "Motion to Vacate Judgment and Attorneys' Fees Award Against the Defendant Anthanasios Livaditis." Livaditis' bankruptcy attorneys contended then and continue to contend that there is no judgment against Livaditis, because he is not named in the one count where damages were assessed. Count VI of the Complaint names only the two corporate defendants and not Livaditis (in any capacity): "In this Count, Plaintiffs sue D'Or School and D'Or Beauty for actual and punitive damages an [sic] reasonable attorney's fees under the Illinois Consumer Fraud Act, Ill. Rev. Stat. Ch. 121½, § 261 et seq" (¶ 68 of Fourth Amended Complaint).

The verdict returned by the jury had three forms. Choice A stated, "We, the jury, find for the Plaintiffs and against all the Defendants. We assess actual damages in the sum of $_____ and punitive damages in the sum of $_____." Choice B allowed the jury to find in favor of the Plaintiffs and against certain Defendants, while in favor of other Defendants and Choice C allowed the jury to find in favor of all the Defendants and against the Plaintiffs. On August 25, 1987, the jury selected Choice A.

The District Court judgment recited the language of the verdict form selected by the jury: "[O]n plaintiffs' Illinois Consumer Fraud Act Count VI, judgment is entered for the plaintiffs and against all of the defendants and assess actual damages in the sum of $640,224.00 and punitive damages in the sum of zero." Thus, the court entered judgment on a verdict which tracked Count VI and which excluded Livaditis as a defendant.

REASONS FOR GRANTING WRIT

I.

WHETHER A DEFENDANT IN AN ACTION IN THE DISTRICT COURT WAS UNCONSTITUTIONALLY DENIED HIS RIGHT TO A JURY TRIAL WHERE THE APPELLATE COURT MAY HAVE ABUSED ITS DISCRETION IN ALLOWING THE PLAINTIFFS TO CONFORM THE PLEADINGS TO THE PROOF AND ADD THE DEFENDANT TO A COUNT IN WHICH HE WAS NOT NAMED AND ON WHICH NO EVIDENCE FROM THE RECORD WAS EITHER PRODUCED OR REFERRED TO.

The Seventh Circuit's holding in footnote 4 of their opinion *Mariluz Rosario, et al. v. Livaditis, et al.*, 963 F.2d 1013, 1022 (7th Cir. 1992), brings that court into conflict with the decision of this Court in *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 359 (1962), in which this Court held that the Seventh Amendment mandated that a jury verdict may not be reexamined by any court of the United States other than in conformity with the rules of the common law. The decision at bar also conflicts with the Seventh Circuit's own authority that holds that a party making an affirmative averment bears the burden of proving his contention. *Bauer v. Clark*, 161 F.2d 397, 400 (7th Cir. 1947). The Seventh Circuit's decision relieved the Class Plaintiffs of the burden of sustaining

their claim that an unnamed defendant could be deemed liable for damages although named in neither the count nor the verdict or the judgment.

The plaintiffs and the lower courts have violated defendant's constitutional right to a trial by jury by contorting Federal Rule of Civil Procedure 15(b) to allegedly conform the pleadings to the proof. Their behavior conflicts with both the express language of 15(b) and the law interpreting 15(b). The District Court and the Seventh Circuit violated Livaditis' right to a jury trial on the issue of his liability when they allowed Livaditis to be found liable as a defendant in a count of the complaint from which he was expressly excluded. The Seventh Circuit finally allowed this emendation long after the trial had taken place.

The purpose of Rule 15(b) is to allow the pleadings to be brought in line with the issues actually litigated in the trial court. *Maruska v. Maruska*, 155 F.2d 302, 303 (7th Cir. 1946). A court may refuse to allow a motion to conform the pleadings to the proof where the proof consists of speculation and conjecture. No authority exists to add an unnamed party defendant to a count after a verdict and judgment, all of which excluded that party. *Sleek v. J.C. Penney Co.*, 324 F.2d 467, 470 (3rd Cir. 1963) (applying Pennsylvania law). In the case at bar, neither the Plaintiffs nor the lower courts made specific reference to any evidence in the record which established their contentions that the jury meant to hold Livaditis liable. The party which makes an affirmative contention about an issue bears the burden of proving its contention. *Bauer v. Clark*, 161 F.2d 397, 400 (7th Cir. 1947) (declaratory judgment action). In this case, the Plaintiffs contend that the evidence shows that Livaditis is liable under the consumer fraud count. However, they have never provided the proof;

they have only provided general, non-specific, and conclusory allegations. The Plaintiffs have failed to provide any factual or legal authority to meet the threshold question of its right to amend a verdict and a judgment after each was entered.

Plaintiffs' complete failure to provide any concrete citations to the record which even remotely suggest either the location in the transcript or the nature of the evidence on which they rely left the lower courts in the position of both speculating about the grounds on which the jury based its verdict and arbitrarily assuming facts to find Livaditis liable on a count in which he was not named.

It is important to remember that Plaintiffs failed to add Livaditis into Count VI through four amendments of the complaint; that they failed to add him into the "aggregate" choice of the jury verdict form (the "all the defendants" choice); or into the judgment order of the district court; or into the appeal to the Seventh Circuit. They failed to add him until Livaditis' bankruptcy counsel attempted to point out that Livaditis was not liable because he was not charged in Count VI.

The Plaintiffs incorrectly ask the Court of Appeals to make a redetermination of the judgment and include in a jury verdict returned on a specific count of a complaint a defendant not charged in the complaint and not found liable in the verdict. However, Livaditis has found settled authority analogous to his circumstances which arise from inconsistent special verdicts and answers to interrogatories propounded to the jury. The cases suggest the plaintiffs cannot do this, and more importantly, that the courts cannot assist them by searching for a view of a verdict with internal inconsistencies which causes the verdict to become inconsistent with the facts of the case. The Supreme Court,

speaking through Justice Douglas, held in *Atlantic & Gulf Stevedore v. Ellerman Lines*, 369 U.S. 355, 359 (1962):

> "Neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.' "

The Court further held at page 364 that:

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment."

Citing *Arnold v. Panhandle & S.F.R. Co.*, 353 U.S. 360, *Dick v. New York Life Insurance Co.*, 359 U.S. 437, 446.

In *Twin Disc, Inc. v. Big Bud Tractor*, 772 F.2d 1329, 1338 (7th Cir. 1985), Judge Flaum writing for the Seventh Circuit and relying on *Atlantic & Gulf Stevedores*, *supra*, held that "[W]hen it appears that there are verdict inconsistencies in a jury's verdict we are required on appeal to attempt to resolve the inconsistencies." In the case at bar it is the Plaintiffs who demand that this Court search for the one possible view of the case that will make the jury's verdict inconsistent.

The Fifth Circuit, in addressing a special verdict containing 28 separate interrogatories that had apparent conflicts, held in *Griffin v. Matherene*, 471 F.2d 911, 915 (5th Cir. 1973):

> "Entry of judgment upon a jury's special verdict with written findings of fact is subject not only to prece-

> dential guidelines but to a constitutional restraint as well. The Seventh Amendment requires that if there is a view of the case which makes the jury's answers consistent, the court must adopt that view and enter judgment accordingly. *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 364 (1962). This court has stated that the test to be applied in reconciling apparent conflicts between the jury's answers is whether the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted, even though the form of the issue or alternative selective answers prescribed by the judge may have been the likely cause of the difficulty and largely produced the apparent conflict. *R. B. Company v. Aetna Insurance Company*, 299 F.2d 753, 760 (5th Cir. 1962). If on review of the district court's judgment we find that there is no view of the case which makes the jury's answers consistent and that the inconsistency is such that the special verdict will support neither the judgment entered below nor any other judgment, then the judgment must be reversed and the cause remanded for trial anew. *Missouri Pacific Ry. Co. v. Salazar*, 254 F.2d 847, 849 (5th Cir. 1958); *Wright v. Kroeger Corporation*, 422 F.2d 176, 178-179 (5th Cir. 1970)."

However, in the case at bar, the verdict can be and should be read consistently to include only the two corporate defendants, the only parties against whom relief was sought: The judgment recites "all the defendants" without naming them, and the jury verdict form names "all the defendants" without naming them individually. To enforce the judgment, one would have to go back to the Fourth Amended Complaint, Count VI, to identify "all the defendants." The Complaint named only the corporate defendants. The Plaintiffs incorrectly tried to amend when Livaditis pointed out their errors.

II.

WHETHER THE APPELLATE COURT ERRED IN ALLOWING THE PLAINTIFFS TO ALTER AND AMEND A JUDGMENT THROUGH EITHER FED. R. CIV. P. 59(e) OR 60(a) OR (b) LONG AFTER THE TIME FOR SUCH ACTION HAD EXPIRED.

Plaintiffs seek to alter or amend the judgment entered on the verdict to hold liable someone who was not charged in the count and against whom no verdict was returned or judgment entered. Federal Rule of Civil Procedure ("Rule") 59(e) requires that "[A] motion to alter or amend the judgment shall be served not later than 10 days after the entry of the judgment." Rule 6(b) specifically precludes any enlargement of time for taking action under Rule 59(e) other than as is set forth in Rule 59(e) itself. In the case at bar no action was ever instituted under 59(e) to amend the judgment.

Rule 60(a), which provides for the correction of clerical mistakes in judgments, is not urged by the Plaintiffs. The Plaintiffs do not suggest that the absence of Livaditis from Count VI entirely, the failure to name him in the verdict or in the judgment are clerical errors that could be corrected by resorting to Rule 60(a). On all other counts, where Livaditis was in fact named as a charged party, he was found not guilty by the jury. In essence, the Plaintiffs are attempting to raise substantive and not clerical issues as to why the judgment should be amended.

Rule 60(b) addresses relief from judgment on substantive ground. However 60(b) (1), (2), and (3), which govern mistake, newly discovered evidence and fraud, are time barred in this cause because motions for relief from the judgment must be brought no later than one year after entry of the judgment.

The Seventh Circuit in *Western Transp. Co. v. E.I Du Pont De Nemours and Company*, 682 F.2d 1227, 1236 (7th Cir. 1982) spoke to the issue of a motion brought by a prevailing Plaintiff, who sought to increase an award within a year after the entry of the judgment. Neither Plaintiff's counsel nor Plaintiff's expert found the error until nearly 16 months after the filing of the complaint. Judge Posner speaking for the Seventh Circuit stated:

> ". . . Western's attorneys inexplicably had failed to check the consultant's damage calculation. [In] these circumstances it was well within the District Court's discretion to decline to increase the judgment. In fact it would probably have been an abuse of his discretion to have granted the motion. A negligent mistake, that is one evincing a lack of due care, is not a proper ground for relief under Rule 60(b). *Bershad v. McDonough*, 486 F.2d 1333, 1337 (7th Cir. 1972). What is due care depends on the cost of an increment of care in relation to its expected benefits. If Western's consultant or attorneys had spent just a few more hours checking their computations before the complaint was filed, or at least before judgment was entered, rather than waiting till after judgment was entered to do so, they would have been able to increase the judgment by more than $27,000 (adding together the $23,000 and the $4,000 errors). It would have cost no more to check earlier than later. Western's mistake was careless and bars relief under Rule 60(b). From this it should also be clear that even if Western's aborted Rule 59(e) motion were treated as a rule 60(b) motion, the denial of relief from the $4,000 error would still have been proper."

The reach of Rule 60(b)(6) was defined by Judge Grady in *United States v. McDonald*, 86 F.R.D. 208, 208 (N.D. Ill. 1980) in the following language: "A claim is cognizable under Rule 60(b)(6) where there is evidence of extraordinary circumstances. *Klapprott v. United States*, 335 U.S.

601, 613 (1949) [extraordinary circumstances found where defense could not be imposed in immigration case because defendant was imprisoned]" (citations omitted). In the case at bar, the Plaintiffs not only fail to allege any extraordinary circumstances which would justify any relief under 60(b)(6), but they fail to allege any facts at all which would justify the relief sought.

Plaintiffs contended in the lower courts that Livaditis appeared and thus the court obtained jurisdiction over him, a matter not in dispute. The Plaintiffs invoked the jurisdiction of the court in clearly defined counts which identified with particularity the defendants charged. However, the Plaintiffs consciously excluded Livaditis from Count VI. The jury returned a number of specific verdicts, each consistent with the relief sought in each count and in conformity with the court's instructions The court's judgment on those verdicts are in like manner consistent with and supported by the verdicts. The Plaintiffs consciously chose not to seek the court's jurisdiction over Livaditis in Count VI. No issues were joined between Livaditis and the Plaintiffs on Count VI.

The Plaintiffs contend that Livaditis expressly consented to be tried on Count VI by virtue of the pretrial order, but the pretrial order does not support this reading. What is clear from the pretrial order is that the parties carefully differentiated between the individual defendant and the corporate defendants in all counts, except in Count VI where there is only a reference to the "defendants". The proposed verdict form for Count VI erroneously listed Livaditis, but the count itself excluded him. Plaintiffs also contend, without citation to the record, that Livaditis did not object at trial to evidence presented which pertained to him on Count VI. Since Plaintiff chose not to join Livaditis in Count VI, no legal or factual issues were joined

between Livaditis and the Plaintiffs on this count, and there would have been no need for him to object. However, it is noteworthy that at no point do the Plaintiffs make specific reference to evidence adduced on Count VI that applied to Livaditis alone and not to the corporate defendants and Livaditis as officer of the corporations.

III.

WHETHER THE PLAINTIFFS HAD THE PROPER STANDING TO INVOKE COURT AUTHORITY AND ASSISTANCE TO ENFORCE A JUDGMENT AGAINST A DEFENDANT WHO WAS NOT NAMED IN THE COUNT OF THE COMPLAINT UPON WHICH PLAINTIFFS SOUGHT ENFORCEMENT.

The Plaintiffs have not sought or received standing to seek relief against Livaditis in Count VI. The Supreme Court in *Flast v. Cohen*, 392 U.S. 83, 98 (1942), in an opinion by Chief Justice Warren, held that:

> "Despite the complexities and uncertainties, some meaningful form can be given to the jurisdictional limitations placed on federal court power by the concept of standing. The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."

Following *Flast* in *Winpisinger v. Watson*, 86 F.R.D. 77, 78 (D.C. 1980), Judge Green held:

> "A plaintiff, in order to invoke the authority of the federal court, must allege a "distinct and palpable injury to himself," *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975), which must be direct and concrete, not abstract, remote or speculative. *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 675 (1974)."

The question of standing is fundamental to a party's right to petition the courts for redress. Article III of the Constitution requires that an actual case or controversy exist between the parties before a dispute between them may be adjudicated by an Article III court. *Flast v. Cohen*, *supra*, at 78, *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, Mo.*, 300 U.S. 227, *rehearing denied*, 300 U.S. 687 (1939); *In re Summers*, 325 U.S. 561, *rehearing denied*, 326 U.S. 807 (1945). In the lower courts, plaintiffs chose not to seek standing to claim relief against Livaditis in Count VI. Since the count does not name Livaditis and no evidence from the record has been provided by the plaintiffs and no judgment naming Livaditis exists, in essence, no controversy exists between Livaditis and the plaintiffs.

SUMMARY

The Plaintiffs relied entirely on their contention that Rule 15(b) would serve to actually or constructively amend pleadings to encompass issues not previously pled but allegedly proved in a case that has been previously tried. At a threshold matter, the Plaintiffs needed to specifically cite facts and authority that distinguishes the case at bar from *Klaprott*, *supra*, and *Atlantic and Gulf Stevedores*, *supra*, and releases them of the obligation imposed by the Federal Rules of Civil Procedure. No such citation to authority or the record was made by Plaintiffs. The Plaintiffs also needed to establish when the need for this relief first came to their attention and what action they took.

In fact, the plaintiffs did not seek to conform the pleadings to an issue allegedly proved, but not pled, but rather, they attempted to amend the verdict and the judgment to include a party defendant not charged in the count,

nor named in the verdict returned, nor in the judgment entered on that verdict, and in the process, they and the lower courts violated Livaditis' right to a jury trial. Plaintiffs cited no authority for that proposition later, but argued that an additional party defendant could be later incorporated into a pleading from which he was purposefully excluded. The cases cited by Plaintiffs in the lower courts discussed legal *issues* that were raised and proved, not *parties* who were excluded in a particular pleading. The cause of action asserted in Count VI was not new to this case; it was pled and tried before the jury. What Plaintiffs sought to do was not to amend the pleadings, but rather to amend the judgment. The Plaintiff's proposed jury instructions carefully described and delineated the three defendants for the counts other than Count VI. In Count VI, the Plaintiff chose to charge only the corporate defendants as having potential liability. The form of verdict erroneously purports to make it possible to assess liability against the individual by naming him as a possible choice for an adverse verdict. However, the jury chose a form of verdict that was fully consistent with the count that they were required to decide on and was further fully consistent with the instructions that they had received. The Court entered a judgment on the jury's verdict that was likewise fully consistent with the jury's verdict.

Plaintiffs do not speak to the effect of any of the Federal Rules of Civil Procedure relating to altering or amending verdicts or judgments, nor do they address the Seventh Amendment or the question of their failure to establish standing as to Livaditis in Count VI, but rather attempt to use Rule 15(b) to transform an issue into a party. There is no support for Plaintiffs' position in the cases cited or in the record as referred to by them. Finally, Plaintiffs' view of the effect of the ambiguous jury verdict on Count

VI is inconsistent with Livaditis' Seventh Amendment Right to a jury trial.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 89-3745, 90-1025, 90-1639

MARILUZ ROSARIO, TERESA SHAPIAMA, LIGNY CANET, DOLORES MALDONADO, CARMEN ORTIZ, SHEILA BENTON, CHARLIE LOWE, MILAGRO PEREZ, MYRNA GARCIA, DANIEL BARBA, ALTAGRACIA LOPEZ and JOYCE E. WALKER, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees, Cross Appellants,

v.

ANTHANASIOS LIVADITIS, also known as TOM D'OR, D'OR BEAUTY COLLEGE, INCORPORATED, an Illinois corporation, and D'OR SCHOOL OF COSMETOLOGY, INCORPORATED, an Illinois corporation,

Defendants-Appellants, Cross Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 1224—**Suzanne B. Conlon,** *Judge.*

ARGUED DECEMBER 3, 1991—DECIDED MAY 13, 1992

Before WOOD, JR.* and FLAUM, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge*.

WOOD, JR., *Circuit Judge*. These appeals arise from a lawsuit instituted by a class of former students of two beauty schools. The class alleged that the schools were "sham schools" because the schools provided little or no education and did not adequately prepare the students for a career in cosmetology despite representations to the contrary. These students' claims were grounded in RICO, the Illinois Consumer Fraud Act and breach of contract. The students' Illinois Consumer Fraud claim and two of three RICO claims that went to the jury were successful, although the jury awarded the class damages only as to the consumer fraud count. The class did not prèvail on one RICO claim or the breach of contract claim.

Defendants-Appellants, Anthanasios Livaditis, D'or Beauty College, Incorporated and D'or School of Cosmetology, Incorporated challenge the certification of the class of former students of D'or Beauty College and D'or School of Cosmetology. Defendants-Appellants also challenge the trial court's decision barring them from further discovery shortly before trial, and they maintain that this court should reverse the jury's verdict regarding the consumer fraud count because of the trial court's discovery decision. Finally, Defendants-Appellants claim that the trial court improperly awarded the class attorney's fees since the jury awarded the class damages only as to the Illinois Consumer Fraud count.[1]

The class brings a cross appeal. They maintain that the trial court abused its discretion in refusing to grant the class' motion for a new trial on damages on the RICO

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* Judge Wood, Jr. assumed senior status on January 16, 1992, after oral argument in this case.

[1] Defendants-Appellants also appealed the trial court's entry of summary judgment on Count VII of the class' fourth amended complaint alleging fraudulent conveyances; however, appellants filed a motion on November 9, 1990, withdrawing their appeal on Count VII prior to argument.

counts for which the jury found the two beauty schools liable but awarded zero damages.

We affirm the class certification and the trial court's ruling on discovery matters. We also affirm the trial court's award of attorney's fees. However, we reverse the jury's verdict granting zero damages to the class while finding the appellant beauty schools liable on two RICO counts and the trial court's denial of a new trial on this issue. In order to find the appellant beauty schools liable on the RICO counts, the jury must have found that the class sustained some injury to business or property. We therefore remand for a hearing on damages as to the RICO counts on which the beauty schools were found liable.

FACTS

Fourteen hundred four former D'or Beauty College and D'or School of Cosmetology students brought a class action suit against the two schools and the schools' owner, Anthanasios Livaditis a/k/a Tom D'or (collectively "D'or"). The class was certified pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3) and consisted of all those who had executed a contract with the beauty schools for the purpose of a cosmetology education and who had attended one of the D'or schools and for whom the corporate defendants received some kind of payment from state guaranteed loan programs between the dates of February 11, 1983, and August 1988. The class included students who attended the D'or schools for as little as 1½ weeks to as long as was necessary to complete the 1500 course hours required for graduation.

The class alleged that D'or violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(a), (c), and the Illinois Consumer Fraud Act ("CFA"), Ill. Rev. Stat. ch. 121½, ¶ 262. The class also brought a common law breach of contract claim against D'or. In their fourth amended complaint, the class additionally sought an order to prevent Livaditis from fraudulently conveying assets to his family members in an attempt to

preclude the assets from being used to satisfy any judgment received by the class. After an 18-day trial, the jury found the two beauty schools liable under RICO, assessing zero damages. The jury found all three appellants liable under CFA and awarded the class actual damages of $640,224. The jury found in favor of all appellants on the breach of contract count and for Livaditis individually on the RICO count asserted against him. Finally, the trial court awarded the class $271,711.80 in attorney's fees.

Discovery took place for over two years before this case went to trial. During this time D'or changed its representation several times. D'or's fourth new counsel, Mr. Prusak, filed his appearance on October 5, 1988, more than a year after the class filed its original complaint. Mr. Prusak became D'or's counsel after a default judgment had been entered against D'or. The default judgment was subsequently vacated. By the time Mr. Prusak filed his appearance as D'or's counsel, the court had already granted an extension on discovery until August 26, 1988. The court stated at that time that no further extension would be granted. Despite this statement, the court extended discovery only to allow the class to complete nine remaining depositions. At this point, Mr. Prusak became D'or's fourth new counsel. Discovery was ordered closed on March 15, 1989, but was again opened until April 5, 1989, in order to allow both parties limited discovery on the class' fraudulent conveyances count, which was added in the fourth amended complaint. On July 12, 1989, the court entered a protective order to prevent D'or's counsel from contacting any of the class' witnesses on any matter concerning the litigation. The class requested that the court issue this order when D'or's counsel notified the class' counsel that he intended to hire an investigator to contact some of the class members. The jury trial began on August 7, 1989, and the jury rendered its verdict on August 25, 1989.

Former D'or students and teachers testified at trial. These witnesses recounted the poor conditions at the two D'or facilities that were not conducive to learning. The

trial testimony indicated that D'or classes contained illiterate students, despite a federal requirement that students lacking a high school education pass an aptitude test in order to be admitted. No student ever failed the D'or admission test. Frequently, there were insufficient numbers of teachers for periods as long as a month or longer at the D'or schools. And, when there were teachers, the student-to-teacher ratio in D'or classes generally exceeded the state requirement of 20-to-1 by ten and often thirty. The lack of teachers resulted in many different levels of students being taught at once in a single class. There were unlicensed teachers at the D'or schools in violation of state law. D'or offered "student teacher" courses, but as soon as the student teachers signed up (and paid $1,000-$2,000 for the course), they were sent into the classroom without any real preparation or instruction. Although the D'or schools advertised that classes in Spanish were available, in many instances there were no Spanish-speaking instructors. As a result, those students speaking only Spanish were forced to attend overcrowded classes in English and learn the best they could.

The students were frequently furnished with substandard equipment that broke shortly after being issued. The students were then required to buy replacement hairdryers, curling irons, and other such equipment at high cost. Moreover, the students were never issued sanitary equipment such as Barbicide jars; they had to buy those from D'or or go without them.

There was testimony indicating that the physical conditions of the D'or schools were as poor as the quality of the teaching. The schools were infested with rodents and cockroaches. The ceilings leaked when it rained, and the heating-ventilating-air-conditioning system was inadequate. The bathrooms were squalid, and the students were often required to clean the bathroom toilets and take out the garbage.

The National Accrediting Commission for Cosmetology Arts and Sciences ("NACCAS") is a private organization

comprised of accredited cosmetology schools nation-wide. The Board of Commissioners of the NACCAS withdrew the two beauty schools' accreditation in June 1987 due to unsafe and unsanitary school facilities, improperly assigned instructional staff, use of unlicensed personnel, equipment not in working order, inadequate heating and air conditioning, multiple classes being taught in the same rooms and unsanitary bathrooms. The NACCAS never re-accredited the D'or schools.

After the trial, the trial court awarded the class $271,711.80 in attorney's fees, which was the entire amount the class requested, save $50 for a Reader's Digest consultation that the court described as "inexplicable."

ANALYSIS

D'or first argues that the trial court improperly certified the class of former D'or students under Fed. R. Civ. P. 23(a). There are four prerequisites to a class action under Fed. R. Civ. P. 23(a): numerosity, commonality, typicality, and fair and adequate representation. Once these four prerequisites are satisfied, the potential class must also satisfy at least one provision of Rule 23(b). D'or does not challenge the trial court's numerosity finding, nor the trial court's finding that the class was maintainable under Rule 23(b)(3). D'or maintains that the class does not satisfy the commonality, typicality or fair representation provisions of Rule 23(a). We will not, of course, reverse the trial court's certification of the class unless we find that the trial court has abused its discretion. *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986).

Fed. R. Civ. P. 23(a)(2) requires that there be questions of law and fact common to the class. D'or says there is no commonality of fact and law between the class members' claims because the class consists of students with varying lengths of exposure to the D'or program, some class members were satisfied with their teachers, and at least two class members graduated from D'or schools and

passed the state licensing exam. D'or asserts that the presence of these two satisfied students shows that not every member of the class suffered, so commonality is not met. The fact that there is some factual variation among the class grievances will not defeat a class action. *Patterson v. General Motors Corp.*, 631 F.2d 476, 481 (7th Cir.), *cert. denied*, 451 U.S. 914 (1980). A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2). *See Franklin v. City of Chicago*, 102 F.R.D. 944, 949-50 (N.D. Ill. 1982). Although D'or can point to two D'or students who managed to pass the state licensing exam in spite of the many obstacles to such a feat that were furnished by D'or, the common question which is at the heart of this case does not change: were the D'or schools operated pursuant to an ongoing scheme to defraud and deceive prospective students?

The question of typicality in Rule 23(a)(3) is closely related to the preceding question of commonality. We have previously stated that a "plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *De La Fuente v. Stokley-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983). In this case each class member's claims arise from the same event or practice of the D'or beauty schools, so the claims meet the typicality requirement. D'or attempts to refute the trial court's finding of typicality by again raising the fact that two members of the class testified at trial that they were satisfied with their cosmetology education. D'or claims the named plaintiffs' case is necessarily diminished by the presence of these "satisfied" students and this antagonism defeats the typicality requirement of Fed. R. Civ. P. 23(a)(3). Whether or not one or two members of the class testified that they were satisfied does not necessarily lead to the conclusion that their claims are not typical of the class. It is more likely that the "satisfied" class members suffered less injury than other class members, not that they suffered no injury. In *De La Fuente*, we noted that we

have not previously interpreted Rule 23(a)(3) to require all class members suffer the same injury as the named class representative. *De La Fuente*, 713 F.2d at 232. Instead, we look to the defendant's conduct and the plaintiff's legal theory to satisfy Rule 23(a)(3). *Id.* at 233.

The final subdivision of Rule 23 requires that the representative parties fairly and adequately represent the class. A class is not fairly and adequately represented if class members have antagonistic or conflicting claims. *Fitzsimmons*, 805 F.2d at 697. D'or raises the argument for the first time on appeal that the class fails Rule 23(a)(4) because the class contains licensed practicing cosmetologists. Usually, we will not consider an argument for reversal raised the first time on appeal unless it goes to the district court's subject matter jurisdiction. *See Heiar v. Crawford County, Wis.*, 746 F.2d 1190, 1196-97 (7th Cir. 1984). D'or attempted to raise this argument after the case was submitted but before the jury rendered its verdict; however, the trial court refused to consider the argument's merits stating that D'or should have submitted it before the case went to the jury. We will consider D'or's argument now, but it makes no difference in this instance because we find the argument has no merit. The argument goes like this: a few class members are satisfied with their education and are now licensed practicing cosmetologists. These successful cosmetologists' livelihood depends upon their reputation. Their reputation is called into doubt as a result of the negative publicity arising from the class action concerning the D'or schools. The entire class is not adequately represented if there are successful class members who are "stigmatized" by the class' lawsuit.

We cannot identify any substantial factual basis for D'or's supposition. If Illinois law required licensed cosmetologists to publicly display their diplomas while they work, perhaps there would be some merit to D'or's theory. However, cosmetologists in Illinois are required only to display a registration certificate that does not indicate where the cosmetologist received his or her education. *See* Ill. Rev.

Stat. ch. 111, ¶ 1701-07, -10. No Illinois law forces a licensed practicing cosmetologist to reveal from what cosmetology school that person graduated. In fact, the field places greater emphasis on where cosmetologists receive continuing education than where they receive the initial 1500 hours of education required for certification. *See, for example*, Carol Kleiman, *Well Tressed Clients Keep Industry Growing*, Chicago Tribune, JOBS 2 (December 21, 1986); *see also* Ill. Rev. Stat. ch. 111, ¶ 1703-07 (requiring a minimum of 20 contact hours of continuing education for renewal of a cosmetology license). The two "satisfied" practicing cosmetologists that D'or points to cannot destroy the certification of the class if the basis of their conflict with the class' claims is speculative.

D'or also contends that the trial court abused its discretion by refusing to allow D'or to engage in discovery after April 5, 1989. D'or further maintains that the class was allowed to continue discovery while D'or was barred by a protective order prohibiting D'or from contacting class members. D'or says that the trial court's discovery orders forced D'or to try the case in a vacuum, and D'or asks us to reverse the jury's verdict finding D'or liable for violations of the Illinois Consumer Fraud Act. In fact, on March 15, 1989, discovery was extended for *both sides* on the class' newly added fraudulent conveyances count, and the protective order was entered to protect the attorney-client relationship of class members and class counsel. D'or's counsel explains that he came to the case after D'or had changed counsel three times, so he needed more discovery in order to be adequately prepared for trial. However, excepting the extension D'or's third counsel requested, the record reveals no indication of requests for extensions on discovery. D'or's fourth counsel had time, approximately six months from the time he filed his first appearance to the time the case went to trial, to do discovery, and if counsel was not able to do as much discovery as D'or would have liked, it is now too late to remedy the situation. A party who fails to pursue discovery in the face of a court ordered cut-off cannot plead prejudice

from his own inaction. *See, for example, Secord v. Cockburn*, 747 F. Supp. 779 (D.D.C. 1990). Accordingly, the judge's decision regarding discovery is affirmed and so is the jury's verdict on Count VI, the Illinois Consumer Fraud Act claim.

D'or's last argument on appeal concerns attorney's fees. D'or says that the Supreme Court's opinion in *Hensley v. Eckerhart*, 461 U.S. 425 (1983), prohibits the class from recovering fees of over $270,000.00 because the class' attorneys spent an overwhelming amount of time on RICO claims for which the class received no damages. *Hensley*, D'or says, requires that the fee award be reduced or limited in relation to the "limited" relief actually obtained by the class. Our answer to D'or's argument is two-fold. First, we do not believe that the jury could find the D'or beauty schools liable for RICO violations and assess an award of $0 damages, and we are reversing the trial court's denial of a new trial on the issue of damages for Counts I and II for reasons which we explain more fully below. Second, we do not believe that *Hensley* nor our own opinions following *Hensley* require a trial court to grant attorney's fees to a prevailing plaintiff in direct proportion to the overall relief obtained.[2]

We review the trial court's grant of attorney's fees for abuse of discretion. *Jardien v. Winston Network, Inc.*, 888 F.2d 540, 549 (7th Cir. 1989). Thus, in *Zook v. Brown*, 865 F.2d 887, 896 (7th Cir. 1989), which D'or cites, this court affirmed a district court's 75% reduction in attorney's fees since the plaintiffs achieved only "limited results" because the trial court's decision was not wholly unreasonable, just as Judge Conlon's decision in this case was not wholly unreasonable.

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[2] We note *Northeast Women's Center v. McMonagle*, 889 F.2d 466 (3rd Cir. 1989), which states that a court cannot reduce the attorney's fee award according to a proportionality rule simply because of the relatively small RICO damages assessed by the jury.

D'or's reliance on *Hensley* is misplaced. The *Hensley* case concerned a class of plaintiffs involuntarily confined in a forensic unit of a state hospital challenging the constitutionality of treatment and conditions at the hospital. The class did not succeed on all of the claims it pursued, but the trial court refused to eliminate from the attorney's fee award those hours spent on unsuccessful claims and granted the class' request for fees pursuant to the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988. The Supreme Court vacated the judgment of the court of appeals affirming the trial court and remanded for further proceedings. D'or hangs its argument on the following part of the *Hensley* opinion: "the district court should focus upon the significance of overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Hensley*, 461 U.S. at 435. Although the language D'or quotes to us seems to mandate the trial court to award attorney's fees in proportion to the relief the prevailing plaintiff obtains, the quoted language does not exist in a vacuum. D'or fails to quote the following language from the sentences preceding the one D'or included in its brief: "Many civil rights cases present only one claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. . . . Such a lawsuit cannot be viewed as a series of discrete claims." *Id.* Once the language D'or quotes to us is put in its proper context, it is clear that the district court in this case did exactly what the *Hensley* Court stated should be done. The class in this case received a damage award for D'or's violation of the Illinois Consumer Fraud Act. The CFA claim is clearly related to the RICO claim—both claims are based on the defendants' failure to provide D'or students with an adequate education that would enable them to become licensed practicing cosmetologists. Only "time spent on claims for relief that are unsuccessful and unrelated to the ultimate result achieved are not compensable." *Jackson v. Illinois Prisoner Review Board*, 856 F.2d 890, 894 (7th Cir. 1988). Although the class did not receive a dam-

age award for the RICO counts on which they prevailed, the time spent on the claims was not unrelated to the claim for which the class did receive damages.

Anyway, to the extent that D'or's argument for reduction of the attorney's fee award granted to the class depends upon the fact that the jury awarded no damages on the RICO counts for which it found the D'or beauty schools liable, the argument's strength is diminished because we do not believe the jury could find the D'or schools liable for RICO violations and award the class $0 damages. The jury found that the D'or schools violated 18 U.S.C. § 1962(a) and (c). A plaintiff prevailing on such a count may receive damages under 18 U.S.C. § 1964(c), which provides: "any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold damages he sustains and the cost of suit, including a reasonable attorney's fee." Judge Conlon instructed the jury: "Before you find for the plaintiffs you must also find that plaintiffs sustained an injury to business or property. Injury to property includes loss of governmental student loans which plaintiffs are obligated to repay." In the face of the statutory provisions quoted above and the Judge's instructions on the law, the jury assessed zero damages after finding the D'or schools liable for violations of RICO, and the trial court refused to grant a new trial on damages. The class has appealed the trial court's denial of its motion.

The trial court's decision to grant or deny a new trial rests within that court's sound discretion and is rarely disturbed. However, while we do not readily overturn a damage award when the trial court has denied the plaintiff's motion for a new trial, we will do so when the jury's verdict is contrary to reason and the trial court's denial of a new trial on damages is an abuse of discretion. *See Pincus v. Pabst Brewing Co.*, 893 F.2d 1544 (7th Cir. 1990); *Bucher v. Krause*, 200 F.2d 576, 586 (7th Cir. 1952), *cert. denied*, 345 U.S. 997 (1953). The trial judge's denial in this case is an abuse of discretion because it is contrary to law.

We have said that a plaintiff injured by RICO violations deserves "complete recovery." *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1310 (7th Cir. 1987). A finding of liability for violations of RICO is conspicuously inconsistent with an assessment of zero damages for those violations since the jury was required to find that the class suffered an injury to business or property before finding D'or liable. The jury's damage assessment is made more remarkable because the jury awarded the class over $600,000 in damages for the CFA claim. Both the RICO claims and the CFA claim were supported by identical facts; thus, it seems that the facts must support some actual damages award for the RICO claims. The Court of Appeals for the Fifth Circuit pointed out as much in *Video International Production, Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075 (5th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989). In *Video International*, VIP sought a new trial on the issue of damages where the jury had found WAX liable for antitrust violations but allotted zero damages for the claim. VIP had tried the case as one set of facts demonstrating a single injury for which the jury could find liability under any one or all of three theories. VIP asserted claims under antitrust, civil rights and Texas tort law. The jury in *Video International* awarded VIP zero damages on the antitrust claim, $200,000 compensatory and $2.5 million punitive damages for the civil rights claim, and $1.245 million actual and $500,000 punitive damages for the Texas tort law claim (tortious interference with contract). The *Video International* court speculated that the jury probably decided the total amount it wished to award and then apportioned the award among the different theories rather than awarding duplicative damages on each separate theory in the same amount. *Video International*, 858 F.2d at 1086. In remanding for damages on all the claims the court looked to the conflict between the jury's assessment of zero damages for the antitrust claim and the jury's wide-ranging damage assessments for the other claims, which were all based on identical facts.

While not identical, the case before us is similar to *Video International*. The *Video International* court ordered a

new trial on all claims, not just the antitrust claim for which the jury awarded no damages. In this case, a new trial on damages for all claims is not warranted, so we affirm the award on the class' CFA claim. However, like the *Video International* court, we suspect some jury confusion in this case. During deliberations, the jury asked the Judge whether it could stipulate that any actual damages it found go back to the federal government for the students' losses. The Judge responded that the jury could not do so. One hour later, the jury rendered its verdict. In her memorandum order denying the class' motion for a new trial on damages, Judge Conlon concluded that the jury could have found the federal government suffered the loss from the defaulted student loans, not the students. This conclusion, however, is not supported by law. It is the plaintiffs who remain liable to the federal government for repayment of the loans, and the jury was instructed that this liability amounted to an injury to business or property for purposes of RICO liability. We emphasize that we are not reversing the trial court's denial of the class' motion for new trial on damages simply because we believe the damages for the RICO counts were inadequate. The jury did not award even nominal damages on the RICO counts. The amount of the students' outstanding loan obligations was presented to the jury by both parties in a joint exhibit. The jury in this case clearly did not consider as damages the students' undisputed loan obligations to the government of $3,478,836.96, yet the jury found D'or liable for RICO violations—a finding which was predicated on determining that the class was injured in business or property, defined as obligations to pay student loans. When the jury verdict is in contravention of the court's instructions, an appellate court will reverse for legal error. *See Wetherbee v. Elgin, Joliet & Eastern Ry. Co.*, 191 F.2d 302, 310 (7th Cir. 1951) (court held that jury verdict was arbitrary and capricious when jury disregarded the court's instructions and the evidence in awarding an excessive verdict); *see also Moore's Federal Practice*, ¶ 59.08[6] (2d ed. 1991). We therefore reverse Judge Conlon's denial of the class' motion for new

trial on damages on Counts I and II of the fourth amended complaint and remand for a hearing on this issue.

We believe a partial new trial on damages for RICO Counts I and II of the fourth amended complaint will not result in an unfair trial for the D'or schools. The D'or schools argue that a new trial on damages only for the two RICO counts is unfair because the damages and liability issues are so intertwined. We do not find the beauty schools' argument persuasive. D'or has not appealed the jury's verdict on RICO liability. Instead, D'or has contented itself with replying to the class' appeal of the damages award. If, as D'or maintains, the damages and liability issues are so strongly intertwined such that a new trial only on the issue of damages is manifestly unfair to D'or, one would think that D'or would have appealed the liability issue. But, the schools left the liability finding unchallenged. Given that there is ample evidence in the record to support the jury's finding of RICO liability on Counts I and II, we believe a new trial is warranted as to damages only.[3]

CONCLUSION

To sum up, we affirm Judge Conlon's certification of the class of students in this case as the certification meets the required elements of Fed. R. Civ. P. 23(a) and 23(b). We also affirm the Judge's refusal to allow D'or more discovery after the discovery cut-off given that D'or's new counsel had time to pursue discovery between the time

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[3] Unfortunately, it seems that a new trial on damages for RICO Counts I and II will be fruitless for the class. At oral argument, D'or's counsel informed the court that Anthanasios Livaditis has filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code and both beauty schools are no longer in business and are undergoing liquidation under Chapter 7 of the Bankruptcy Code. Nevertheless, the class deserves the right to have a judgment that it can seek to have enforced even in the face of the bankruptcy filings.

he entered the case and the time the case went to trial and given that no extension was ever requested. Since we affirm the Judge's discovery decisions, we affirm the jury's verdict in favor of the class' Illinois Consumer Fraud claim. The attorney's fee award is also affirmed. Finally, although we understand the reasoning behind Judge Conlon's denial of the class' motion for new trial, we believe that decision must be reversed. The jury's verdict of $0 after finding the D'or schools liable on RICO violations is inconsistent with law. We therefore remand only for a new trial on damages for Counts I and II of the fourth amended complaint, damages awarded under Count VI, the CFA count, are affirmed. Costs against Defendants-Appellants, Circuit Rule 36, shall not apply.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.[4]

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[4] On March 11, 1992, after oral argument, indeed after the foregoing opinion was prepared, Livaditis's bankruptcy counsel filed two motions. The first is entitled "Motion for Leave to File Additional Appearance" and the second is entitled "Motion to Vacate Judgment and Attorneys' Fee Award Against the Defendant Anthanasios Livaditis." The motions indicate that Livaditis was not named as an individual in Count VI of the complaint (Illinois Consumer Fraud); Count VI lists only the two beauty schools as defendants. However, the jury found in favor of the class and against all the defendants, including Livaditis, on Count VI, and the district court entered judgment accordingly. Now Livaditis asks us to allow his bankruptcy counsel to file an appearance in this case and to allow him to argue that the judgment against him be set aside because the district court was without jurisdiction to enter judgment against him on Count VI.

It is much too late in the day to allow Livaditis to assert these arguments. Livaditis did not raise the fact that he was not named in Count VI of the complaint at trial even though evidence was presented regarding his individual liability on that count and he could have objected when evidence was presented that went beyond the scope of the complaint. He did not object when the verdict form listed his name as a defendant in Count VI and the jury found him liable on that count with the two beauty schools. And,

(Footnote continued on following page)

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[4] *continued*

he did not object when the district court judgment order clearly named him as a defendant in Count VI. The argument he now attempts to raise does not go the district court's subject matter jurisdiction, and at this point the argument is considered waived. *See, for example, Gray v. Lacke*, 885 F.2d 399, 409 (7th Cir. 1989), and *Heiar v. Crawford County, Wis.*, 746 F.2d 1190, 1196-97 (7th Cir. 1984).

We also believe that defect in the complaint was effectively amended by the subsequent trial proceedings. Although he was not named in Count VI of the complaint, Livaditis came to trial and defended himself on the count. We have already noted that the verdict form listed his name, and the district court's order clearly included him as a defendant in Count VI. Finally, Livaditis even appealed the judgment entered against him on Count VI. Fed. R. Civ. P. 15(b) allows the pleadings to be amended to conform to the evidence presented at trial even after judgment. After thoroughly reviewing the record, we believe the evidence, at least implicitly, amended the pleadings in this case.

The trial is over. The appeal is over. Livaditis had plenty of opportunities to make the arguments he is now attempting to assert. We deny both the "Motion for Leave to File Additional Appearance" and the "Motion to Vacate Judgment and Attorneys' Fee Award Against the Defendant Anthanasios Livaditis."

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 7, 1992

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge*
Hon. JOEL M. FLAUM, Circuit Judge
Hon. JESSE E. ESCHBACH, Senior Circuit Judge

Nos. 89-3745, 90-1025, 90-1639

MARILUZ ROSARIO, TERESA SHAPIAMA, LIGNY CANET, DOLORES MALDONADO, CARMEN ORTIZ, SHEILA BENTON, CHARLIE LOWE, MILAGRO PEREZ, MYRNA GARCIA, DANIEL BARBA, ALTAGRACIA LOPEZ and JOYCE E. WALKER, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees, Cross Appellants,

v.

ANTHANASIOS LIVADITIS, also known as TOM D'OR BEAUTY COLLEGE, INCORPORATED, an Illinois corporation, and D'OR SCHOOL OF COSMETOLOGY, INCORPORATED, an Illinois corporation,

Defendants-Appellants, Cross Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 1224 — Suzanne B. Conlon, *Judge.*

* Judge Wood, Jr. assumed senior status on January 16, 1992, after oral argument in this case.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendant-appellant Anthanasios Lividitis on May 27, 1992, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing with suggestion for rehearing *in banc* be, and the same is hereby, DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

Rosario, et al.

v.

Livaditis, et al.

CASE NUMBER 87 C 1224

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED as follows: On plaintiffs' RICO Counts I and II, judgment is entered for plaintiffs and against defendants D'Or Beauty College, Inc. and D'Or School of Beauty, Inc. and assess zero amount of actual damages. Judgment is further entered for defendant Livaditis and against the plaintiffs on plaintiffs' RICO Count IV, judgment is entered against the plaintiffs and for the defendant Livaditis; on plaintiffs' Breach of Contract Count V, judgment is entered against the plaintiffs and for all of the defendants; and on plaintiffs' Illinois Consumer Fraud Act Count VI, judgment is entered for the plaintiffs and against all of the defendants and assess actual damages in the sum of $640,224.00 and punitive damages in the sum of zero.

August 25, 1989
Date

/s/ H. STUART CUNNINGHAM
Clerk

/s/ CLAUDIA M. FLAGG
(By) Deputy Clerk
Claudia M. Flagg

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

Rosario, et al.

v.

Livaditis, et al.

CASE NUMBER 87 C 1224

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that on Count VII of the fourth amended complaint, judgment is entered for plaintiffs and against defendants.

August 29, 1989
Date

/s/ H. STUART CUNNINGHAM
Clerk

/s/ CLAUDIA M. FLAGG
(By) Deputy Clerk
Claudia M. Flagg